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IN THE

Supreme Court of the United States

ANDALUSIA DISTRIBUTING COMPANY, INC., *et al.*,
Petitioners,
v.
R.J. REYNOLDS TOBACCO COMPANY,
Respondent.

ANDALUSIA DISTRIBUTING COMPANY, INC., *et al.*,
Petitioners,
v.
PHILIP MORRIS USA INC.,
Respondent.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT PHILIP MORRIS USA INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners mischaracterize the unpublished opinion they ask this Court to review. A proper reading of that decision presents the following questions:

1. Whether petitioners failed to support factually their claim that Philip Morris USA Inc.'s market-share based distributor incentive program is not "functionally available" to them?

2. Whether petitioners failed to present evidence sufficient to establish any element of their attempted monopolization claim?

CORPORATE DISCLOSURE STATEMENT

Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc., a publicly owned corporation.

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BRIEF IN OPPOSITION

Philip Morris USA Inc. ("PM USA") opposes the petition for writ of certiorari to review the unpublished opinion of the United States Court of Appeals for the Sixth Circuit in *Smith Wholesale, et al. v. Philip Morris USA Inc.*

STATEMENT OF THE CASE

A. Introduction

Petitioners ask this Court to review a legal principle the Sixth Circuit never established based on the same allegations the courts below unanimously found unsupported after reviewing the extensive factual record. Petitioners' antitrust claims were dismissed at summary judgment for the simple reason that petitioners failed to present evidence to support them. The legal principles that dictated that result are in accord with all relevant decisions of this and every other court. There is no basis for further review.

Wholesale Leaders 2003, the market-share based incentive program at issue in this case, does *not* award higher discounts to distributors based on the volume of cigarettes they sell. It therefore makes no difference whether a distributor sells 100 cartons or 100,000 cartons; the discount is the same as long as the number of PM USA cigarettes sold represents a certain *percentage* of the distributor's total cigarette sales. The dispute here is not over the controlling rule of law, but over the application of that law to the record facts developed after almost two years of extensive discovery. Every judge who has reviewed those facts has come to the same conclusion – that PM USA's discounts are functionally available to petitioners even though they have chosen not to pursue them.

The Sixth Circuit did *not* uphold PM USA's program by establishing a "*per se* rule" that "immunizes" discount programs from scrutiny under the Robinson-Patman Act "as long as the seller 'offers' the lower price to all buyers." Pet.

3, 21-22. Indeed, it clearly and expressly rejected such a rule:

> Market-share discounts *theoretically* level the playing field by allowing competing purchasers of like commodities to participate on equal terms, regardless of size ... *We nonetheless would be remiss if we were to suggest that market-share discounts were immune from Robinson-Patman scrutiny.* It is certainly conceivable that under certain circumstances, as alleged here by plaintiffs, *market-share discounts could be administered in such a manner that such incentives cross the fine line from pro-competitive incentives to exclusionary, anti-competitive price discrimination.*

Pet. App. 18a (emphasis added); *see also* Pet. App. 62a. Rather, the Sixth Circuit correctly found that petitioners offered *no evidence* that such circumstances were present in this case.

Moreover, the Sixth Circuit did *not* hold that offering a "worthless choice" of committing "commercial suicide" insulates a seller from complaints of price discrimination. Pet. 3. The court held that petitioners did not face a "worthless choice," but faced the same choices as all other distributors and made choices consistent with their "focus on selling rival products." Pet. App. 69a-70a. It was petitioners' decisions regarding "brand prioritization and marketing strategy [that] governed their level of participation in" PM USA's program, and because "it is *these choices, not PM's formula*, that determine whether plaintiffs will earn PM's higher discounts," the discounts are "functionally" available. Pet. App. 69a-71a (emphasis added).

An equally thorough review of the facts also led the Sixth Circuit to reject petitioners' attempted monopolization claim. The court "examined closely the economic reality of the market at issue" and all of "the particular facts disclosed by the record," *Eastman Kodak Co. v. Image Technical*

Servs., Inc., 504 U.S. 451, 467 (1992) (quotation omitted), in correctly holding that petitioners' claims failed due to a lack of proof on every essential element of that claim under the governing legal standard.

Petitioners offer no basis for further review; there is no conflict with the decisions of this Court or any other court. The Sixth Circuit fully considered and correctly decided the issues, which turned upon the application of settled law to the specific facts of the case. Petitioners simply disagree with the result, but that disagreement is no basis for review.

B. The Wholesale Leaders Program

PM USA competes with major manufacturers and scores of new manufacturers who have recently entered and captured a significant share of a market the Sixth Circuit called "even more competitive than ever."[1] Pet. App. 73a. PM USA sells cigarettes to approximately 700 distributors, who sell them to retailers, who in turn sell them to adult consumers. These same distributors also sell cigarettes manufactured by PM USA's competitors. Though PM USA is the leading cigarette manufacturer by market share, its rivals "account for more than half of all cigarettes sold in the United States"[2] (Pet. App. 53a), and a single competitor, Reynolds American, now accounts for almost one third (31%) of that market. Pet. App. 3a.

Competition among cigarette manufacturers includes bidding for the attention and efforts of distributors with discount incentive programs. Pet. App. 53a. PM USA's

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[1] The collective market share of these new entrants had risen from .89% in 1998 to almost 15% of the market by 2003. Pet. App. 3a.

[2] Petitioners contend PM USA's dollar market share (56%) is greater than its unit market share (48%). Pet. App. 53a, 72a. The difference is irrelevant because the Sixth Circuit accepted petitioners' market share allegation and based its market power analysis on that figure. Pet. App. 72a.

program, called Wholesale Leaders, is one way PM USA *lowers* the retail prices of its products, including Marlboro, its leading brand, which has a *lower* average retail price than the key competing premium brands. *Id*; Pet. App. 73a. Distributors, for their part, receive competing offers from manufacturers, some of which they accept and some of which they reject. Pet. App. 53a. Like other manufacturers, PM USA tries to persuade as many distributors as possible to accept its offers and make selling PM USA brands their first priority.[3]

PM USA has offered distributor incentives based on market share for almost fourteen years. It does not award incentives based on the *volume* of products sold (or purchased) by a distributor. Thus, the program does not favor large buyers over smaller buyers with lesser purchasing power. Pet. App. 55a, 65a n.9. Instead, PM USA seeks to enlist the competitive efforts of distributors of all sizes by awarding discounts to those that sell PM USA products as a greater percentage of their total cigarette sales.

When its market share fell nearly four percentage points from 2001 to 2002, PM USA cut prices and realigned its distributor incentive program to make it more competitive. Pet. App. 54a. The Sixth Circuit accurately described the elements of the new program, called Wholesale Leaders 2003, and noted the relationship between PM USA's market share and the program's share targets that belies petitioners' mischaracterization of the program. *Compare* Pet. 5 *with* Pet. App. 65a-66a. The Sixth Circuit also noted that PM USA set different performance targets based on its market share in different areas of the country, offered and

[3] PM USA's program competes with distributor incentives offered by other cigarette manufacturers, including the program offered by respondent R.J. Reynolds Tobacco Company, which petitioners also challenged under the Robinson-Patman Act with virtually identical allegations that the Sixth Circuit found lacked factual support. Pet. App. 42a-50a.

"uniformly applied" the program to all PM USA distributors, and set *every* target for every level of discount at or *below* 49.9%, meaning that no distributor ever had to make PM USA products more than that percentage (and often far less than that percentage) of its total cigarette sales to receive the highest discount. Pet. App. 54a-55a & n.4, 65a-66a. There was, in addition, "*no evidence* that PM manipulated the [program] to favor certain wholesalers." Pet. App. 65a (emphasis added).

Petitioners are seventeen of the almost 700 distributors who participate in PM USA's program who, along with the other plaintiffs in the courts below, include some of the largest wholesale distributors in the United States. Contrary to their suggestion that PM USA's program constitutes an offer that "only a few have any hope of accepting" (Pet. 21), since the program was introduced, literally *hundreds* of distributors of all sizes operating in geographic areas throughout the United States have qualified for every level of discount as they respond differently to incentives offered by competing manufacturers. Pet. App. 65a-66a. Undisputed data confirmed, moreover, that PM USA's program does not favor large volume distributors over smaller volume distributors. Pet. App. 65a n.9. The result, the Sixth Circuit noted, was *increased* price competition in the cigarette industry. Pet. App. 70a (emphasis added).

C. Procedural History

Petitioners filed suit on June 11, 2003, claiming price discrimination under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and an attempt to monopolize under Section 2 of the Sherman Act, 15 U.S.C. § 2. They alleged they were powerless to obtain PM USA's highest discounts mainly because they serve retailers who sell large amounts of deep discount cigarettes. As a result, they claim, pursuing PM USA's discounts would be ruinous. Pet. App. 60a-61a.

The Sixth Circuit reviewed the district court's decision granting summary judgment in PM USA's favor and

unanimously affirmed. It observed that the choices that would allow petitioners to earn PM USA's highest discounts – "where to operate, what products to sell, which retail customers to serve, what prices to charge, and how to sell those products" – are faced by all distributors. Pet. App. 69a. It rejected as unfounded petitioners' allegation that PM USA's discounts are "unavailable to them" because they operate in unique markets with unusually high demand for non-PM USA products. Pet App. 68a. It also rejected the allegation that petitioners had "no real choice" with respect to their sales mix because the evidence showed that a distributor's sales mix is not dictated by the market share of any given brand. *Id.* To the contrary, it was "brand prioritization and marketing strategy" that determined petitioners' level of participation in the program and the undisputed evidence showed they "chose to focus on selling rival products." Pet. App. 69a-70a. In such circumstances, PM USA's discounts were "functionally available to plaintiffs." Pet. App. 70a-71a.

The Sixth Circuit also rejected petitioners' attempted monopolization claim for lack of evidence. Petitioners presented "*no evidence*, either direct or indirect, that PM possesses monopoly power." Pet. App. 72a (emphasis added). The court also found PM USA's market share insufficient to establish a dangerous probability of achieving monopoly power where it is undisputed that (i) "Marlboro's average retail price remains lower than prices of other key premium brands," (ii) PM USA repeatedly has responded to competition from deep discount brands by lowering its prices, (iii) PM USA's rivals maintain substantial excess production capacity, and (iv) there are low barriers to entry. Pet. App. 73a. The court also found petitioners' allegations of foreclosure and specific intent to monopolize to be wholly unsupported. Pet. App. 74a.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Properly Stated and Correctly Applied Settled Law to Petitioners' Price Discrimination Claim.

Petitioners seek to manufacture a conflict with this Court's decision in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), by portraying the Sixth Circuit as having held that discounts "offered to the entire marketplace" are "*per se* lawful, requiring no other analysis or justification." Pet. 21-22. The Sixth Circuit was clear and explicit that it did not establish any such *per se* rule and instead recognized that "price discrimination may arise *under various pricing structures*, not limited to volume-based discounts." Pet. App. 18a (citing *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963) (emphasis added)); *see also* Pet. App. 62a. It was only as a matter of record fact that the court held that petitioners failed to substantiate their claim that PM USA's market-share based discount program crossed "the fine line from pro-competitive incentives to exclusionary, anti-competitive price discrimination." Pet. App. 64a ("*The undisputed material facts show* that PM's best discount ... is functionally available to plaintiffs") (emphasis added).

Indeed, if the court had established a *per se* rule, then it had no need to conduct the extended analysis contained in the two separate opinions petitioners now ask this Court to review. Resolution of this matter would have been extraordinarily simple: petitioners admitted that (1) PM USA offered them its discounts and (2) PM USA made those discounts available based on the percentage of PM USA product each distributor sold, and *therefore* (3) the discounts must – under this purported rule – have been functionally available. As petitioners themselves state, there would have been nothing more for the Sixth Circuit to say. Pet. 22.

The Sixth Circuit's analysis, however, was not so limited and follows this Court's decision in *Morton Salt*, which teaches that courts must look beyond formalities to the

particular facts of a case to determine whether a discount that seems to be generally available is in fact available as a functional matter. 334 U.S. at 42-43. The Sixth Circuit conducted exactly the required review of the evidence, and rejected petitioners' claim on that basis (Pet. App. 65a-71a), concluding that "*the undisputed evidence* confirms that the [program's] most favorable discount is functionally available to all of PM's direct distributors." *Id.* at 67a (emphasis added). In so ruling, the Sixth Circuit adhered to this Court's admonition to avoid legal presumptions and formalistic distinctions in antitrust cases, and determine "on a case-by-case basis" whether "there is evidence of [price discrimination] ... and if the effect of that discrimination may be to substantially lessen competition." Pet. App. 19a.

That same factual inquiry led the Sixth Circuit to reject petitioners' claim that they were "[j]ust like ... the smaller retailers in *Morton Salt*." Pet. 17. The court considered petitioners' assertion that "[q]ualification for [PM USA's] discounts was not something within their control" (Pet. 19), but held the extensive record in this case refutes that allegation. The court first noted that "[a]ll multi-brand, full-line distributors" face choices with respect to their "customer bases" and "areas of sales." Pet. App. 68a-69a. It then rejected as unfounded petitioners' allegation that "PM's market share and the increased demand for competitor and [deep discount] products by consumers" somehow prevented petitioners from achieving PM USA's highest discounts. Pet. App. 68a (PM USA's "market share in plaintiffs' sales area, defined by zip code, is equivalent to PM's market share in the Sections that include those sales areas."). The evidence established that petitioners' sales areas do not doom them to failure because "almost every plaintiff sells non-PM product at a much higher percentage than the market shares of those products in plaintiffs' sales areas, indicating that a particular sales mix is not necessarily inhibited by a

manufacturers' overall market share in the sales area." Pet. App. 68a.[4]

Quite to the contrary, it was again "the *undisputed evidence*" that demonstrated that "plaintiffs faced a choice that was 'not an inequity imposed by the pricing structure but a fundamental economic conundrum *faced by all sellers*.'" Pet. App. 69a (quoting *Krist Oil Co., Inc. v. Bernick's Pepsi-Cola of Duluth, Inc.*, 354 F. Supp. 2d 852, 857 (W.D. Wis. 2005)) (emphasis added). Their decisions regarding which brands to emphasize and how to market them determined, as with every other distributor, whether petitioners received PM USA's higher discounts, but petitioners "chose to focus on selling rival products" rather than pursue those discounts. No broad *per se* legal principle defeated petitioners' claim; the evidence did:

> Here, in the absence of evidence of discriminatory application of the market-share incentives, and in light of deposition testimony of plaintiffs' representatives consistently indicating that brand prioritization and marketing strategy governed their level of participation in the [program], we can only conclude that it is *these choices, not PM's formula*, that determine whether plaintiffs will earn PM's higher discounts.

Pet. App. 69a-70a (emphasis added).

Petitioners argue the Sixth Circuit's opinion has "little or no legal support" in decisions of lower courts applying the functional availability doctrine since *Morton Salt*. Pet. 19-

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[4] The same evidence contradicts petitioners' assertion that "it was taken as established that making that choice would cause a massive loss of customers" and therefore "the theoretical existence of the 'choice' is irrelevant because it is functionally meaningless." Pet. 17. This assertion misrepresents the factual record and the Sixth Circuit's decision, which rejected petitioners' attempt to blame their performance on location and customers alone. Pet. App. 68a-70a.

20. Yet the holding that a discount is functionally available where foregoing it results from putting some business priorities ahead of others clearly is based in those decisions. *See, e.g., Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 120-21 (3d Cir. 1980) *cert denied*, 451 U.S. 911 (1981) ("a uniform pricing formula applicable to all customers is not a price discrimination under the act" where "the distributors, not the [manufacturer]" control the decisions that determine what discount distributors receive); *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326-27 (6th Cir. 1983) (program "functionally available" where "[i]t was a matter of discretion with each dealer, in the exercise of its business judgment, whether to take advantage of the promotion"); *Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105-06 (6th Cir. 1981), *cert denied*, 454 U.S. 897 (1981) ("Where a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis ... no price discrimination has occurred"). Petitioners admit the key to this precedent is whether not receiving a discount is "a result of the plaintiff's own conduct and free choices" (Pet. 17) – just what the Sixth Circuit held petitioners exercised here.

With no basis to challenge to the Sixth Circuit's actual holding, petitioners try to portray themselves as different because they had already dedicated themselves to strategies favoring rival brands. Pet. 10. As the courts consistently have held, however, the fact that petitioners may have to make different choices to qualify for a discount does not render them unavailable.[5] Thus, in *Bouldis*, the discount was functionally available even though the plaintiff alleged "cash flow and inventory problems which prevented him" from

[5] As the Sixth Circuit noted, PM USA "presented evidence that numerous distributors, including some plaintiffs (such as Taylor, Huntsville, Eby-Brown, and Smith), actually increased their PM shares and altered their sales mix sufficiently to move from the lowest to higher levels of [the program]." Pet. App. 67a-68a n.11.

receiving the discount. 711 F.2d at 1327. In *Capital Ford Truck Sales v. Ford Motor Co.*, summary judgment was granted even though the plaintiff claimed its focus on small customers made it impossible to meet the seller's bulk-sale condition for a discount. 819 F. Supp. 1555, 1578-79 (N.D. Ga. 1992). In *Am. Tara Corp. v. Int'l Paper Co.*, the discount was functionally available even though the buyer claimed the necessary choices "would have threatened [plaintiff's] very existence." No. 79-C-1470, 1981 WL 375752, *2 (N. D. Ill. July 30, 1981); *see also Krist Oil*, 354 F. Supp. 2d at 857 (finding functional availability where plaintiffs "needed" to make different business decisions under defendant's pricing structure); *see also* Barbara O. Bruckman, *Discounts, Discrimination, and Exclusive Dealing: Issues Under the Robinson-Patman Act*, 68 Antitrust L.J. 253, 270 (2000) ("[I]f a customer can take advantage of a discount but chooses for its own reasons not to do so, the seller is not later liable under Section 2(a) for losses that customer may suffer by virtue of that choice").[6]

Courts have applied this principle to assess allegations of price discrimination under very different circumstances. In *Sweeney*, for example, a gasoline distributor sued Texaco when Texaco changed how it calculated discounts based on the distance between Texaco's plants and distributors' bulk storage facilities. 637 F.2d at 119-20. The court held Texaco's discounts functionally available because Texaco applied the same formula for calculating discounts to all distributors and "it is the distributors, not Texaco, who

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[6] *See also Precision Printing Co., Inc. v. Unisource Worldwide, Inc.*, 993 F. Supp. 338, 349-52 (W.D. Pa. 1998) ("Had [plaintiff] not been financially troubled, and had management not made a policy decision to buy paper only on an 'as-needed' basis, [plaintiff] would have had the benefit of the favorable prices enjoyed by its competitors."); *In re Iams Co. Litig.*, No. C-3-90-014, 1992 WL 1258514, *2-3 (S.D. Ohio July 24, 1992) (holding discount functionally available over plaintiff's allegation participation not "economically possible").

determine where to place their bulk storage plants, and it is the distributors, not Texaco, who decide which retail stations they will supply." *Id.* at 121. It was irrelevant that some distributors' prior choices regarding the location of their storage facilities and which retail customers to serve resulted in their receiving lower discounts than their competitors when Texaco changed its formula.

Likewise, in *Shreve*, the Sixth Circuit found a discount functionally available where, as here, qualifying for the discount meant choosing between alternative benefits. The plaintiff's CEO and sole shareholder served as the defendant's territorial sales manager, for which he was paid a salary and commissions. 650 F.2d at 103-04. The defendant refused, however, to pay in addition to an otherwise generally available volume discount to the CEO's company. Thus, the plaintiff faced a choice between accepting discounts that would have amounted to approximately $28,500 (but foregoing the salary) or accepting compensation of $57,000 (but foregoing the compensation). *See id.* at 104 & n.3. Shreve elected the salary and commissions and declined the discount, which was functionally available as a result. *Id.* at 106.

The Sixth Circuit properly stated and applied the same principle in this case, finding that PM USA established a "market-share based pricing formula that is uniformly applied to all of PM's approximately 700 direct distributors" (Pet. App. 64a-65a), each with different businesses and different business strategies. Each business made its own choices about where to operate, which products to promote and sell, which retail customers to serve, what prices to charge, how best to sell those products, and so on and so forth. Pet. App. 69a. Petitioners, like all other distributors, made (and continue to make) decisions in all of those areas guided by their focus on selling rival products. Pet. App. 69a-70a. While there may be some risks that come with pursuing the rewards of PM USA's best discounts, all distributors that pursue those discounts face those same risks,

as the Sixth Circuit rightly concluded, and the discounts are functionally available as a result. Pet. App. 69a (finding petitioners faced choices that were "not an inequity imposed by the pricing structure but a fundamental economic conundrum faced by all sellers.") (quotation omitted).

Further, the principle applied by the Sixth Circuit rightly contemplates that qualifying for a better discount may involve favoring some brands over others. *Iams*, 1992 WL 1259814 at *2-3 (holding discount functionally available even though only distributors willing to carry the Iams brand on an exclusive basis qualified for the discount, over plaintiff's objection that participation was not "economically possible" because it "would mean giving up other brands"). Manufacturers engaged in interbrand competition will present conflicting incentives to their customers and a purchaser's "[c]ommitment to a particular product is the *sine qua non* of an incentive program." Pet. App. 20a. What matters, the Sixth Circuit held, is that any given incentive be functionally available to petitioners, not that they be guaranteed the ability to participate in every one. Pet. App. 70a ("Wholesalers that choose to direct their efforts away from PM brands should not ... reasonably expect to receive the same incentive payments awarded to those wholesalers that provide greater support for PM brands.").

Petitioners disingenuously accuse the Sixth Circuit of trying to "paper over" their unsupported claims of "impossibility" by quoting selectively from the court's explanation of why in some cases "a reasonable purchaser [would] *not* take advantage of the best possible price" even if it were "realistically and practically available." *Compare* Pet. App. 32a-33a *with* Pet. 19. As the Sixth Circuit explained in text that petitioners omit, "purchasers in competitive markets, particularly multi-brand distributors or wholesalers, must make difficult economic choices, prioritize brand sales and often decline conditional discounts for reasons unrelated to their actual ability to obtain them." Pet. App. 32a-33a. Though petitioners (literally) elide this

point, they can no more deny the force of the complete explanation than they can deny the force of the uncontested evidence that they made precisely this kind of business decision regarding PM USA's discounts. Pet. App. 68a-70a.

Petitioners' contrary argument relies unconvincingly on two cases that the Sixth Circuit correctly found distinguishable. *See* Pet. at 20 (*citing Calumet Breweries, Inc. v. G. Heileman Brewing Co.*, 951 F. Supp. 749 (N.D. Ind. 1994) and *Nat'l Dairy Prods. Corp. v. FTC*, 395 F.2d 517 (7th Cir. 1968)). As the Sixth Circuit correctly stated: "The present case bears little resemblance to *Calumet Breweries, Inc.*," a district court decision issued at the preliminary injunction stage, which presented "a case of 'blatantly discriminatory' favoritism, where the defendant supplier structured its volume discount program to specifically favor its largest customer, by effectively granting a secret discount." Pet. App. 34a n.12. A discount that is specifically designed so that *only* a manufacturer's *largest* customer can qualify plainly violates the Robinson-Patman Act. The defendant in *National Dairy* attempted to evade *Morton Salt*, arguing that its volume discounts were functionally available because "the disfavored independents should have joined voluntary or cooperative groups and thus obtained higher discounts. 395 F.2d at 523. The Seventh Circuit, in a decision rendered almost forty years ago, rejected this argument because it would have completely frustrated the recognized purpose of the Act. *Id.*; *accord Morton Salt*, 334 U.S. at 43. The Sixth Circuit correctly concluded that PM USA's discount program poses no such problems because "unlike *National Dairy*, [it] neither involves a volume discount nor avers that plaintiffs must join forces and sacrifice their independence." Pet. App. 35a n.12.

Ultimately, petitioners simply disagree with the Sixth Circuit's conclusion that they failed to present sufficient proof of their claim that PM USA's discounts are functionally unavailable. That disagreement, however, does not merit the attention of this Court.

II. The Sixth Circuit's Ruling Makes Perfect Sense.

Petitioners devote several pages of the petition to their argument that the Sixth Circuit's decision "makes no sense" because "a seller need only say that it 'offered' the discounts to everyone." Pet. 21. This irrelevant argument addresses itself to a rule that the Sixth Circuit did not establish.[7]

In fact, the Sixth Circuit's ruling makes perfect sense in the light of established functional availability precedent as well as this Court's recent admonition that the Robinson-Patman Act must be construed "consistently with the broader policies of the antitrust laws." *Volvo Trucks North Am., Inc. v. Reeder-Simco GMC, Inc.*, 126 S.Ct. 860, 873 (2006) (quotation omitted). Interbrand competition, this Court reaffirmed, "is the primary concern of antitrust law" and "the Robinson-Patman Act signals no large departure from that main concern." *Id.* at 872 (quotation omitted). The Sixth Circuit properly viewed *Volvo Trucks* "as a backdrop for [its] evaluation of plaintiffs' secondary-line price discrimination claim" (Pet. App. 17a), and, considering the undisputed record evidence, determined that "the price discounts [offered by PM USA] *foster – not impede – competition* among suppliers of different brands." Pet. App. 70a (emphasis added); *accord Victory Brands v. Philip Morris USA Inc.*, No. 03-74972, 8 (E.D. Mich. July 29, 2004) (finding Wholesale Leaders 2003 "tends to increase competition among manufacturers").

Petitioners, on the other hand, urge an interpretation of the Robinson-Patman Act that would allow a single distributor to claim that a discount is not practically available

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[7] Nor did the Sixth Circuit create "[a]n 'outside influence' exception to the requirement of functional availability." Pet. 22. Rather, the court held that the uncontested *evidence* showed that petitioners made decisions about what customers to pursue and what brands to emphasize and it was *those choices* that caused them not to obtain the discounts. Pet. App. 69a-70a.

because it requires altering its business in some way. This rule would condition the legality of a uniformly applied market-share discount program on the extent to which a manufacturer *guarantees* its discounts are actually received by all buyers. As the Sixth Circuit rightly held, petitioners' position would "transform the relevant legal question, whether PM's best price is 'available,' into the irrelevant question whether most distributors *actually accepted* PM's best offer," which "simply reflects the outcome of different choices made by different wholesalers." Pet. App. 66a-67a (quotation omitted) (emphasis added). That some distributors choose not to accept PM USA's best discounts "is an anticipated norm in the cigarette market" where "multi-brand, fullservice distributors" do not "always accept or seek to attain a particular manufacturer's best prices in all of their sales areas." Pet. App. 67a. Petitioners' contrary suggestion that the courts mandate "tailor-made discounts ... would undo the very basis of a market-share based incentive program and run afoul of the Robinson-Patman Act." Pet. App. 69a. That interpretation is one "geared more to the protection of existing *competitors* than to the stimulation of *competition*," which the Sixth Circuit was right to resist. Pet. App. 64a (quoting *Volvo Trucks*, 126 S.Ct. at 872) (emphasis in original).

III. The Sixth Circuit Properly Rejected Petitioners' Attempted Monopolization Claim.

Petitioners argue that their Sherman Act claim "merited a closer look than it received" from the courts below. Pet. 27. Yet they do not identify a single point of law in either opinion that conflicts with *any* ruling of *any* other court. The Sixth Circuit properly stated and applied settled law in concluding that petitioners failed to present sufficient evidence to create a triable dispute on *any* of the three elements of their attempted monopolization claim. Moreover, petitioners do not even address the Sixth Circuit's ruling that they failed to substantiate factually the required element of a specific intent to monopolize. Pet. App. 74a,

95a. Thus, even if this Court granted review on the questions presented by the petition, the result would be no different on remand. This independent, dispositive basis for rejecting petitioners' attempted monopolization claim makes this case an inappropriate vehicle to review the Sherman Act question presented in the petition.

A. The Sixth Circuit Correctly Held That Petitioners Failed To Establish Market Power.

Market power is "the ability of a single seller to raise price and restrict output." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992) (quotation omitted). The Sixth Circuit agreed with the district court that "there is *no evidence*, either direct or indirect, that PM possesses monopoly power." Pet. App. 72a (emphasis added). Petitioners claim that the Sixth Circuit erred in that analysis because market power can be inferred from PM USA's market share without anything more. Pet. 25. That position conflicts directly with established precedent.

The Sixth Circuit correctly recognized that market share is "only a starting point" for determining the existence of market power and even a commanding market share does not necessarily give rise to that inference. Pet. App. 72a (quotation omitted); *accord Eastman Kodak*, 504 U.S. at 466-67 ("In determining the existence of market power ... this Court has examined closely the economic reality of the market at issue") (citation omitted); *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc.*, 159 F.3d 129, 141 (3d Cir. 1998) ("Alleging market share alone is not sufficient to state a claim" of attempted monopolization).[8]

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[8] *See also Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corp.*, 79 F.3d 182, 197 (1st Cir. 1996) (market power can be shown where defendant has a "dominant share," if there are also "significant barriers to entry," and "existing competitors lack the capacity to increase their output"); *M&M Med. Supplies and Serv. v. Pleasant Valley Hosp.*, 981 F.2d 160, 168 (4th Cir. 1993) (it is always necessary to consider "ease of en-

(continued...)

The Sixth Circuit examined the record, and concluded that undisputed market facts – in particular, PM USA's lower prices in response to competition, rivals' "substantial excess production capacity," and a "lack of difficulty of entry into" the U.S. cigarette market – refute petitioners' allegation that PM USA's market share, standing alone, is sufficient to sustain an inference of market power. 73a (quotation omitted). Petitioners do not dispute these facts, but instead question their import based on the bare assertion of their expert that new entry did not have "much effect" on PM USA's pricing and sales. Pet. 23-24. The Sixth Circuit, however, properly rejected this conclusion as being in direct conflict with the undisputed facts. *Advo, Inc. v. Philadelphia Newspaper, Inc.*, 51 F.3d 1191, 1198 (3d Cir. 1995) ("expert testimony without ... a factual foundation cannot defeat a motion for summary judgment") (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993)).

In light of these market realities, the Sixth Circuit concluded that petitioners failed to present evidence from which an inference that PM USA possesses market power could reasonably follow: "PM cannot price above competitive levels because rivals will simply enter and increase input." Pet. App. 73a; *accord Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986) ("[W]ithout barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time"); *Brooke Group*, 509 U.S. at 226 ("[W]here new entry is easy ... summary disposition ... is appropriate"); 2A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 420a, 58 (2d ed. 2002)

(...continued)

try, which heralds slight chance of success [of attempted monopolization]"); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 969-70 (10th Cir. 1990) (forty-seven to sixty-two percent market share creates presumption of *lack* of market power) (emphasis added).

("[I]nference of market power from a large market share is wrong if entry conditions are not taken into account"); 3A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶807g, 378-79 (2d ed. 2002) ("Barriers to entry have even greater significance in attempt cases than in monopolization cases."). The Sixth Circuit took note of the uncontested evidence that PM USA not only lacked the power to unilaterally raise prices above competitive levels, but actually *lowered* its prices in response to competition. Pet. App. 72a-73a. Petitioners not only offered no contrary evidence, but admit that PM USA competes in an oligopoly in which a single competitor commands almost one-third of the market. That latter fact alone is fatal to a claim that PM USA possesses unilateral market power. *See, e.g., Rebel Oil, Inc. v Atl. Richfield Co.*, 51 F.3d 1421, 1443 (9th 1995) ("[O]ne firm *alone* must have the power to ... exclude competition. An oligopolist lacks this unilateral power") (citation omitted).

Petitioners argue that the Sixth Circuit was mistaken to conclude that PM USA lowered its prices when it lost market share because some distributors did not receive PM USA's highest discounts. Pet. 23. But the fact that *some* distributors did not receive PM USA's lowest prices is irrelevant to the Sixth Circuit's finding that "both before and since implementation of [the program], when PM lost market share, it responded by lowering prices" generally. Pet. App. 72a-73a. The same holds for petitioners' disagreement with the Sixth Circuit's conclusion about the relevance of comparing PM USA's premium brand prices to the prices of deep discount brands. *See* Pet. 23. Petitioners fail to mention that the prices of *all* premium brands are higher than deep discount brands. As the Sixth Circuit held, what is important is that Marlboro, a premium brand, has an average retail price that "*remains lower* than prices of other key premium brands and became *even lower* after the introduction of" Wholesale Leaders 2003. Pet. App. 73a (emphasis added).

Finally, petitioners suggest that this Court should resolve a circuit split on the *factual* issue of whether PM USA has market power. Pet. 24-25. Resolving such a conflict, even if it existed, is not an appropriate basis for review. As important, there is no disagreement on that question. *See* Pet. 24-25. In one unpublished case cited by petitioners, the Fourth Circuit, after affirming summary judgment in favor of PM USA on other grounds, declined to affirm the district court's determination that PM USA lacks market power. *R.J. Reynolds Tobacco Co. v. Philip Morris, Inc.*, No. 02-1595, 2003 WL 21456688, 812 (4th Cir. June 24, 2003). In another case that did not even involve PM USA, the Seventh Circuit commented in *dicta* that the district court's finding regarding the issue of *R.J. Reynolds' market power* was "questionable," as petitioners note, but also "irrelevant," as petitioners curiously omit from their excerpt of the opinion. *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper*, 462 F.3d 690, 694-95 (7th Cir. 2006). There is plainly no conflict in need of resolution.

B. The Sixth Circuit Correctly Held That Petitioners Failed To Establish Anticompetitive Conduct With Specific Intent To Monopolize.

Petitioners disagree with the Sixth Circuit's conclusion that they failed to present evidence of anticompetitive conduct. Pet. App. 73a-74a. Their basis for disagreement – that PM USA's market share discount program allegedly forced deep discount cigarette brands out of the market (Pet. 25) or to "less efficient" means of distribution (Pet. 15) – are completely unsupported, and, as the Sixth Circuit noted, contradicted by petitioners' own testimony that if they "discontinue[d] sales of" deep discount brands, "those brands would immediately be picked up by a competing distributor." Pet. App. 74a (quotation omitted). Petitioners also hypothesize that the discount program was "very likely" to result in increased competitor costs and pricing. Pet. 25. Again, the Sixth Circuit rejected that assertion as without support, concluding Wholesale Leaders 2003 was a "valid

business reaction to market pressure brought about by increased competition." Pet. App. 74a (quotation omitted). Petitioners offer no basis to question these conclusions.

Petitioners' provocative claim that "[t]he practical effect of these programs has been to reduce both the number of competing wholesalers and the number of brand offerings in the marketplace," (Pet. 14), is likewise completely unsupported. There is not a stitch of evidence that *any* distributors, manufacturers, or brands have left the market, as is evident from petitioners' complete lack of record support for that assertion. In fact, the record evidence proves exactly the opposite, showing the entry and rapid expansion of brands offered in the marketplace, all while Wholesale Leaders has been in effect. Pet. App. 73a. The Sixth Circuit, therefore, rightly rejected the notion that PM USA's discount practices "harm competition at the distribution level" and "threaten competitive harm at the manufacturing level" (Pet. 14), and instead held that these "price discounts foster – not impede – competition among suppliers of different brands." Pet. App. 70a.

Finally, petitioners argue that *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), and *Lepage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), undermine the Sixth Circuit's analysis. *See* Pet. 26-27. Those decisions, however, do not condemn PM USA's discount program and are otherwise distinguishable on their face. First, in both cases, the defendants were *admitted monopolists* and the decisions addressing their conduct simply stand for the settled proposition that "a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior." *Lepage's*, 324 F.3d at 151-52. These cases offer no support for the contention that Wholesale Leaders 2003 should be deemed anticompetitive.

Second, both cases are legally and factually inapposite. *Conwood* involved egregious conduct by an admitted monopolist directed toward a single competitor. 290 F.3d at 788. These actions have no counterpart in this case, and, even if they did, such actions taken by a firm without monopoly power do not reflect an "ability to exclude rivals." Likewise, the monopolist in *Lepage's* offered "bundled discounts" for separate products to use its monopoly over some of its products to leverage sales of its other products. 324 F.3d at 147. The case is irrelevant here, because the law governing bundled discounts is inapplicable to a single-product program such as Wholesale Leaders 2003. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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